DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1003

[EOIR Docket No. EOIR 20–0010; A.G. Order No. 5912-2024]

RIN 1125–AB00

Expanding the Size of the Board of Immigration Appeals

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: On April 1, 2020, the Department of Justice ("the Department" or "DOJ") published an interim final rule ("IFR") with request for comments that amended its regulations relating to the organization of the Board of Immigration Appeals ("Board") by adding two Board member positions, thereby expanding the Board to 23 members. This final rule responds to comments received and adds five additional Board member positions, thereby expanding the Board to 28 members. The final rule also clarifies that temporary Board members serve renewable terms of up to six months and that temporary Board members are appointed by the Attorney General.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Raechel Horowitz, Chief, Immigration Law Division, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Falls Church, VA 22041, telephone (703) 305–0289.

SUPPLEMENTARY INFORMATION:

I. Summary of this Rulemaking

A. Background and Purpose of the Interim Final Rule ("IFR")

The Executive Office for Immigration Review ("EOIR") administers the immigration court system of the United States. In most instances, a case begins before an immigration judge after the Department of Homeland Security ("DHS") files a charging document with the immigration court. *See* 8 CFR 1003.14(a). A charging document generally charges a foreign-born individual with being subject to removal from the United States under the Immigration and Nationality Act ("INA" or "the Act"). Subsequently, the immigration judge determines whether the individual is deportable or inadmissible and thereby subject to removal, and, if they are deportable or inadmissible, whether they merit either immigration relief or protection from removal. EOIR's Office of the Chief Immigration Judge administers these adjudications through the nationwide immigration court system.

Immigration judges' decisions are generally subject to review by the Board, which is EOIR's appellate body and the highest administrative tribunal for interpreting and applying U.S. immigration law. *See* 8 CFR 1003.1(b). Board decisions are subject to review by the Attorney General. *See* 8 CFR 1003.1(g), (h). Decisions by both the Board and the Attorney General may be subject to further judicial review. *See* INA 242, 8 U.S.C. 1252. The Board's adjudicators are known as Board members or appellate immigration judges. The number of Board members is set by regulation at 8 CFR 1003.1(a)(1). The Board issues both precedent and non-precedent decisions, and a decision may be designated as a precedent by a majority vote of permanent Board members. *See* 8 CFR 1003.1(g)(3).

The 2020 IFR noted that, at the time of its promulgation, EOIR's caseload was at its highest ever, and that EOIR had been hiring a significant number of immigration judges as a result. *See* Expanding the Size of the Board of Immigration Appeals, 85 FR 18105, 18106 (Apr. 1, 2020) (providing statistics for the pending caseloads at the immigration courts and the Board). The IFR stated that it was necessary at that time to increase the size of the Board in light of these factors. The IFR acknowledged that increasing the size of the Board had the potential to decrease cohesion and lessen the Board's ability to issue precedent decisions. Given these

countervailing considerations, the IFR increased the size of the Board by two members, from 21 to 23 members.

B. Provisions of the IFR

The IFR amended 8 CFR part 1003 by revising 8 CFR 1003.1(a)(1) to increase the number of Board members from 21 to 23. The rule revised the third sentence of 8 CFR 1003.1(a)(1) to read as follows: "The Board shall consist of 23 members." The IFR did not make any other changes to the remainder of paragraph (a)(1) or to any other regulatory provision.

C. The Final Rule

This final rule revises the regulations in four ways, the first pertaining to the number of Board members and the remaining three to the appointment of temporary Board members.

With respect to the first revision, EOIR's caseload has continued to rise in the approximately four years since the IFR was promulgated. The agency is currently facing the largest caseload in its history before both the immigration courts and the Board. At the end of fiscal year 2023, there were over 2.4 million cases pending before the courts and over 113,000 appeals pending before the Board.[1] In order to meet the increased immigration court caseload, the Department has prioritized immigration judge hiring, and the immigration judge corps has expanded significantly in recent years (with the number of immigration judges increasing from 442 at the end of fiscal year 2019 to 734 at the end of fiscal year 2023).[2] Immigration judges are collectively completing more cases than ever before, including more than 523,000 case completions in fiscal year 2023.[3]

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[1] *See* EOIR Adjudication Statistics: Pending Cases, New Cases, and Total Completions (Oct. 12, 2023), https://www.justice.gov/media/1174681/dl?inline; EOIR Adjudication Statistics: All Appeals Filed, Completed, and Pending (Oct. 12, 2023), https://www.justice.gov/media/1174881/dl?inline.

[2] *See* EOIR Adjudication Statistics: Immigration Judge (IJ) Hiring (Oct. 2023), https://www.justice.gov/media/1174816/dl?inline.

[3] *See* EOIR Adjudication Statistics: Pending Cases, New Cases, and Total Completions (Oct. 12, 2023), https://www.justice.gov/media/1174681/dl?inline.

The IFR observed that, "if the Board becomes too large, it may have difficulty fulfilling its responsibility of providing coherent direction with respect to the immigration laws," noting that "a substantial increase in the number of Board members may make the process of issuing [precedent] decisions more difficult." 85 FR 18106. The Department continues to recognize the importance of this consideration but believes that significant recent increases to the immigration courts' caseload—which has more than doubled since the end of fiscal year 2019—warrant a corresponding expansion of the Board by five members, from 23 to 28 members. The final rule revises 8 CFR 1003.1(a)(1) to do so.

With respect to the other revisions, 8 CFR 1003.1(a)(4) provides that the EOIR Director may designate individuals who meet certain qualifications "to act as temporary Board members for terms not to exceed six months." These temporary Board members "shall have the authority of" permanent members "to adjudicate assigned cases" but may not vote on any matter decided by the Board en banc or participate in Board votes on whether to designate a decision as precedent. 8 CFR 1003.1(a)(4), (g)(3). The designation of temporary Board members provides "an appropriate means of responding to an unanticipated increase or temporary surge in the number, size, or type of cases, and other short-term circumstances that might impair the Board's ability to adjudicate cases in a manner that is timely and fair." Board of Immigration Appeals: Composition of Board and Temporary Board Members, 71 FR 70855, 70856 (Dec. 7, 2006).

The EOIR Director has had the authority by regulation to designate temporary Board members since 1988. *See* Board of Immigration Appeals; Designation of Judges, 53 FR 15659, 15659–60 (May 3, 1988). Initially, the regulations permitted the EOIR Director to designate temporary Board members "for whatever time the Director deems necessary." *Id*. at 15660. In 1998, the regulations were revised to specify that the Director had the authority to designate temporary Board members "for terms not to exceed six months." *See* Board of Immigration Appeals: En Banc Procedures, 63 FR 31889, 31890 (June 11, 1998). The regulations have since been revised to expand the categories of individuals eligible to serve as temporary Board

members,[4] but the reference to temporary Board members serving "terms not to exceed six months" has remained unchanged.

Notably, since 1998, eligible individuals have regularly been designated and then re-designated as temporary Board members for consecutive "terms" of six months or less. EOIR invests substantial resources in training temporary Board members. It is therefore important they be able to serve consecutive terms. Given this history, the absence of any regulatory limit on a temporary Board member's total length of service, and the long-existing regulatory authority for temporary Board members to serve "terms" in the plural, EOIR codifies in this rule its longstanding interpretation that its governing regulations (1) restrict the length of a single term but not the total time that a temporary Board member may serve, and (2) authorize the designation of temporary Board members for additional six-month terms. Taking this longstanding practice into account, this final rule amends 8 CFR 1003.1(a)(4) in the interest of clarity to explicitly state that temporary Board members' six-month terms are "renewable."[5]

This final rule also amends 8 CFR 1003.1(a)(4) to more clearly reflect how temporary Board members are appointed. Generally, the EOIR Director has been responsible for selecting qualified individuals to serve as temporary Board members, with the approval of the Deputy Attorney General where required. However, those individuals have been appointed and reappointed to temporary Board member positions by the Attorney General. *See Carreon v. Garland*, 71 F.4th 247, 253–54 (5th Cir. 2023) (stating that "the Attorney General has authority to renew the terms of temporary BIA members," and that "documentation substantiates the Government's assertion that the temporary BIA members were reappointed by the Attorney General, not the Director"); *Brito v. Garland*, 40 F.4th 548, 553 (7th Cir. 2022) (stating that "after the two temporary Board members' six-month terms had expired, the Attorney General

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[4] *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 FR 54878, 54902 (Aug. 26, 2002); 71 FR at 70857.

[5] The regulations also contain a separate provision allowing the EOIR Director, with the approval of the Attorney General, to designate individuals who meet certain qualifications to serve as temporary immigration judges for "renewable terms not to exceed six months." *See* 8 CFR 1003.10(e)(1)(i), (ii).

reappointed both members to an additional term of six months"). In the interest of more precisely describing this process, this final rule amends 8 CFR 1003.1(a)(4) to state that the Attorney General "appoint[s]" temporary Board members "upon the recommendation of the Director."

Finally, this final rule amends 8 CFR 1003.1(a)(4) to more accurately characterize the nature of temporary Board members' roles. Though 8 CFR 1003.1(a)(4) currently states that individuals who have been selected "act" as temporary Board members, it is more accurate to state that such individuals "serve" as temporary Board members. They are appointed to positions on the Board and are not considered "acting" Board members who merely perform the functions and duties of the position. Accordingly, this final rule amends 8 CFR 1003.1(a)(4) to state that individuals who have been selected "serve," instead of "act," as temporary Board members.

D. Provisions of the Final Rule

The final rule revises the third sentence of 8 CFR 1003.1(a)(1) to read: "The Board shall consist of 28 members." The final rule further revises the first and second sentences of 8 CFR 1003.1(a)(4) to state that temporary Board members are "appoint[ed]" by the Attorney General "upon the recommendation of the Director," and that they subsequently may "serve" for "renewable terms."

II. Public Comments on the IFR

The IFR was exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date because it is a rule of management or personnel as well as a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(a)(2), (b)(A), (d). The Department nonetheless chose to promulgate the rule as an IFR in order to provide the public with an opportunity for post-promulgation comment.

A. Summary of Public Comments

The IFR's comment period closed on May 1, 2020, with 11 comments received.[6] Individual commenters submitted nine comments, and organizations submitted two comments. Three comments expressed overall support for expanding the Board, although two of those comments concurrently opposed other facets of the IFR or the immigration system as a whole.

B. Comments Expressing Support for the IFR

Comment: Three commenters generally supported the 2020 IFR's expansion of the Board. Commenters noted that expanding the Board was a "positive step" toward more timely review of appeals and addressing the growing caseload. In addition, two of those commenters suggested adding even more Board positions due to the size of the pending caseload and its anticipated future growth.

Response: The Department appreciates the commenters' support for the rule. In the 2020 IFR, the Department assessed that expanding the Board to 23 members was warranted. 85 FR at 18106. In light of further growth to EOIR's caseload, the Department has now determined that it is appropriate to expand the Board by five additional members, for a total of 28 members, and the Department is doing so in this final rule.[7] The Department believes that adding five additional members strikes the proper balance between addressing EOIR's growing caseload and maintaining cohesion amongst Board members. This further expansion is in line with the suggestions of two of the commenters referenced above.

C. Comments Expressing Opposition to the IFR

1. Contradicts Prior Rulemakings

Comment: Some commenters expressed opposition to the 2020 IFR because they disagreed with the Department's determination that 23 Board members were necessary. One

[6] The Department reviewed all 11 comments submitted in response to the rule; however, the Department did not post four of the comments to regulations.gov for public inspection. Of these comments, three were unrelated to the rulemaking, involving questions about personal immigration matters or concerns about the previous administration's social media activity, and one included only the word "test." Accordingly, the Department posted seven comments.
[7] In addition, the Department notes that this is the third time in recent years that it has engaged in rulemaking to expand the size of the Board. *See* Expanding the Size of the Board of Immigration Appeals, 83 FR 8321 (Feb. 27, 2018); 2020 IFR, 85 FR 18105. Should the Department determine in the future that additional Board members would help EOIR achieve its mission, the Department may engage in further rulemaking at that time.

organization commented that the Department failed to address why the "optimum" size of the Board changed from 21 members (as provided by a 2018 final rule that expanded the Board from 17 to 21 members) to 23 members (as provided by the 2020 IFR). The organization also urged the Department to "fully explain why the additional two Board members are necessary." The organization stated that the Department used the "exact same language" in both the 2020 IFR and the 2018 final rule. *Compare* 83 FR at 8322 ("Keeping in mind the goal of maintaining cohesion and the ability to reach consensus, but recognizing the challenges the Board faces in light of its current and anticipated increased caseload . . . ."), *with* 85 FR at 18106 (same).

Relatedly, another organization commented that the 2018 final rule and the 2020 IFR together increased the Board's size by six members—a 26 percent increase. This organization argued that such an increase contradicted the reasoning in both the 2018 final rule and the 2020 IFR that the Board must maintain "coherent direction" and "administrability" in issuing precedent decisions. *See* 85 FR 18106; 83 FR 8322.

Another organization opposed the 2020 IFR's reasoning for adding more Board members, alleging that it was inconsistent with justifications in a 2002 rulemaking that implemented procedural reforms for the Board. The commenter pointed to statements the Department made at the time that the addition of new Board members had not reduced the backlog of cases and that "the problem [was] rooted in the structure and procedures of the Board." Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 FR 7309, 7310 (Feb. 19, 2002) (proposed rule); *see also* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 FR 54878, 54894 (Aug. 26, 2002) (final rule) ("The continued expansion of the Board has not effectively reduced the existing case backlog. The one element that has begun to help reduce the backlog—streamlining—is being expanded through this rule.").

This organization alleged that the 2020 IFR directly contradicted this reasoning by adding more Board members as a way to address the current and anticipated pending caseload, while

failing to consider or offer analysis of streamlining methods. The organization was concerned that the 2020 IFR represented a departure from the uniformity principles that had prompted the 2002 reforms to Board procedures and would lead to delays in adjudicating immigration cases.

Other commenters more generally stated that additional Board members would not resolve the Board's backlog, identifying the roots of the problem as related to immigration policy and increased immigration enforcement efforts over the course of several presidential administrations without the necessary infrastructure to support such efforts.

Response: The Department does not believe that any elements of the 2020 IFR or the present final rule conflict with prior rules regarding the number of Board members.

First, the Department did not imply in the 2018 final rule that the Board's optimum size would always be 21 members, nor did it imply in the 2020 IFR that the Board's optimum size would always be 23 members. Instead, as the Department recognized in both the 2018 final rule and the 2020 IFR, the appropriate number of Board members may fluctuate over time based upon changing factors. For example, the Department stated in the 2018 final rule that it had recently hired new immigration judges and that it "expect[ed] that, as these additional immigration judges enter on duty, the number of decisions rendered by the immigration judges nationwide will increase, and the number of appeals filed with the Board will increase as a result." 83 FR 8321–22. The 2020 IFR also referenced the recent hiring of additional immigration judges and similarly predicted that these hirings would result in increased appeals, s*ee* 85 FR 18106. The present final rule is likewise premised in part on recent increases in cases and the hiring of additional immigration judges.

Second, the 2020 IFR weighed the benefit of additional members against potential challenges achieving cohesion and consensus as the Board grows. *See* 85 FR 18106. In deciding to expand the Board again through the present final rule, the Department has similarly balanced the benefits of expansion against its costs. The Department's ultimate weighing of the relevant costs and benefits will predictably change over time in response to changed circumstances. But

because the Department considered in the 2020 IFR the importance of Board cohesion as part of its overall determination of the appropriate number of Board members, and has again considered the importance of cohesion in this final rule while reaching a different ultimate conclusion about the number of Board members necessary at this time, neither the 2020 IFR nor the present final rule contradicts the Department's prior statements on the importance of Board cohesion and similar considerations.[8]

The Department also disagrees with any contention that the 2020 IFR conflicted, or that the present final rule conflicts, with the Department's 2002 statements identifying procedural reforms, as opposed to additional Board members, as the solution for tackling the Board's pending caseload. At that time, the Department implemented numerous procedural changes designed to increase the Board's adjudicatory efficiency, including the establishment of a case screening system and allowances for single-member Board decisions in certain circumstances. *See* 8 CFR 1003.1(e); *see also* 67 FR 54880–81. In addition, the Department determined that it would reduce the size of the Board to 11 members 180 days after enacting that rule. 67 FR 54893. The Department noted that the decision to reduce the Board to 11 members was intended to respond to "resource needs, capacities and resources of the Board" at that time, and further recognized that the determination about the appropriate number of Board members could change "in light of changing caseloads and legal requirements following implementation" of the 2002 rule. *Id*. While the Department determined at that time that the procedures implemented by the rule would adequately address the Board's backlog, even after ultimately reducing the size of the Board to 11 members, the Department made clear that it would "continuously review" the rule's efficacy in achieving the Department's goals. *Id*. at 54881.

[8] Further, the Department notes that the Attorney General may issue precedent opinions where necessary. 8 CFR 1003.1(h). Notably, the Attorney General may direct the Board to refer cases to himself, or the Chairman or a majority of the Board may refer cases to the Attorney General. 8 CFR 1003.1(h)(1)(i)–(ii). The availability of Attorney General review further mitigates concerns over a heightened risk of lack of consensus amongst a greater number of Board members, especially when that risk is weighed against the need to increase the capacity to adjudicate cases before the Board.

Despite the prior expansions and procedural reforms, the Board's caseload has continued to increase, and the issues the Board faced in 2002 differ from those the Board faced when the 2020 IFR was promulgated and continues to face today.[9] The Department's response to circumstances on the ground in 2020 and again today, as the Board's caseload continues to increase despite the reforms implemented in 2002, is not in conflict with the 2002 rulemaking, which in any event expressly recognized that the Board's staffing may be adjusted depending upon changing needs.[10]

Finally, comments attempting to tie the Board's backlog to longstanding concerns about immigration policy and enforcement are outside the scope of this rulemaking. The 2020 IFR amended the regulations to expand the Board from 21 to 23 members, and this final rule now further expands the Board to 28 members. The Department's purpose in expanding the Board has been and is to ensure that the Board can fairly and expeditiously adjudicate cases given its increasing caseload, bearing in mind the need to maintain the Board's cohesion. Neither the 2020 IFR nor this rulemaking have purported to resolve the backlog in its entirety, and general issues involving immigration policy and enforcement are outside the scope of this limited rulemaking. Accordingly, the Department declines to respond to the generalized policy and enforcement concerns referenced above.

2. Policy Concerns

Comment: One organization opposed the 2020 IFR in part on the grounds that the Board's backlog is most efficiently reduced not by adding Board members but rather by hiring more attorneys, paralegals, and administrative staff. This organization cited the Department's cost analysis of Board adjudications in another rulemaking, which the organization characterized

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[9] *Compare* 67 FR 54878 (57,597 pending appeals on September 30, 2001), *with* EOIR Adjudication Statistics: All Appeals Filed, Completed, and Pending, https://www.justice.gov/media/1174881/dl?inline (Oct. 12, 2023) (over 72,000 pending appeals at the end of fiscal year 2019, and over 113,000 pending appeals at the end of fiscal year 2023).

[10] To the extent that the 2020 IFR and this final rule could be characterized as a change in position from the 2002 rulemaking, the Supreme Court has made clear that an agency may change its position, so long as it provides a reasoned explanation for the change and demonstrates that there are "good reasons" for the new policy. *FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009).

as demonstrating that Board members have the highest salary but contribute the least amount of substantive work in adjudications. *See* Fee Review, 85 FR 11866, 11873 (Feb. 28, 2020) (proposed rule). The organization noted that increasing the number of attorneys, paralegals, and administrative staff would have an additional benefit because such positions would "not have to be weighed against the goals of maintaining cohesion and the ability to reach consensus" (internal quotations omitted).

Response: The Department disagrees that the Board's increasing caseload can be addressed exclusively by hiring staff members. Although attorneys, paralegals, and administrative staff play a critical role at the Board, only Board members may actually decide appeals. That said, the Department will, on an ongoing basis, evaluate the need for additional attorneys, paralegals, and administrative staff to support the new Board members so as to ensure that the Board's adjudicatory capacity is not limited by insufficient Board personnel.

Comment: Commenters expressed opposition to the 2020 IFR based on assertions that the Department and EOIR have engaged in irregular hiring practices. Commenters objected to the appointment of specific Board members in 2019, based upon their backgrounds and alleged ideology. Commenters also raised concerns that some Board members have served simultaneously as both immigration judges and Board members, and also that some Board members have not been required to physically report to EOIR's headquarters in Falls Church, Virginia.

One organization urged the Department to commit to a transparent hiring process that "does not favor specific ideological perspectives."

Response: As an initial matter, the Department notes that specific hiring practices for the Board, including the procedures for selecting future Board members and the criteria for considering applicants, are outside the scope of the 2020 IFR, which relates only to the Department's determination regarding the total number of authorized Board member positions. For the same reasons, concerns regarding the work location of certain Board members, EOIR's

management of Board members' caseloads, and similar administrative issues also fall outside the scope of this rulemaking.

Nevertheless, the Department emphasizes that Board members, as is the case with all EOIR employees, are selected on their own merit following a thorough hiring process. EOIR "welcome[s] applicants from the many communities, identities, races, ethnicities, backgrounds, abilities, religions, and cultures of the United States who share [DOJ's and EOIR's] commitment to public service." *See* Department of Justice, job posting for Appellate Immigration Judge (Board Member), https://www.justice.gov/legal-careers/job/appellate-immigration-judge-3 (last updated June 2023). These commenters have offered no basis to conclude that the Department's process for hiring Board members will inhibit the effective functioning of the Board as expanded by this rulemaking.

Comment: One organization expressed opposition to the 2020 IFR based on an alleged lack of transparency, pointing to a lawsuit that advanced concerns with how EOIR responded to a Freedom of Information Act ("FOIA") request that pertained to the hiring of Board members.

Response: The Department declines to respond in a public rulemaking to the commenter's remarks about pending litigation. Nevertheless, EOIR processes and responds to all FOIA requests in accordance with the relevant laws and regulations. FOIA requests may be submitted through the Public Access Link at https://foia.eoir.justice.gov/app/Home.aspx, or mailed to:

> Office of the General Counsel Attn: FOIA Service Center
> Executive Office for Immigration Review
> 5107 Leesburg Pike, Suite 2150
> Falls Church, VA 22041

Comment: Commenters raised concerns pertaining to the substance of some Board decisions and to some Board members' alleged ideology. One organization argued that the 2020 IFR furthered efforts to "shift the ideology" of the Board by adding members who would be "ideologically aligned" with "prioritizing speed over due process, and prioritizing deportation

over fairly adjudicated cases." The organization asserted that the Board's role had evolved into narrowing eligibility for "virtually every form of relief."

One commenter expressed concerns about eroding the "core ideal of inclusion for all," while another alleged that the Department had improperly influenced immigration judge decisions by pressuring judges to favor one party in proceedings over another.

One commenter argued that an independent commission should be responsible for appointing Board members with the intention that the commission would preclude appointment of "partisan judges" to the Board.

Response: The primary purpose of this rulemaking is to expand the Board given its increased caseload. Concerns about the substance of recent Board decisions or hypothetical future Board decisions, or about the alleged ideology of Board members, are outside the scope of this rulemaking.

Nevertheless, the Department disagrees with the above comments and declines to implement the suggestion to form an independent commission to appoint Board members. The 2020 IFR was not, and the present final rule is not, politically motivated, and commenters' assertions that Board members act in a political capacity are unsubstantiated. Members of the Board are not political appointees but rather are hired as career civil servants who are unaffiliated with a particular administration. The hiring of Board members may not be, and is not, based on a candidate's personal political affiliation. *See* 5 U.S.C. 2302(b)(1)(E) (prohibiting discrimination against federal employees or applicants for federal employment on the basis of political affiliation). In deciding cases, Board members exercise independent judgment and discretion in accordance with the regulations. 8 CFR 1003.1(d)(1)(i)–(ii). The Board is required to adjudicate all cases before it fairly and expeditiously. *See* 8 CFR 1003.1(d)(1). The Department and EOIR do not pressure Board members to do otherwise or to issue decisions that contravene the statutes, regulations, and caselaw that govern the Board's adjudications.

3. Suggestions

Comment: One commenter suggested that the Department add four Board member positions instead of two positions. The commenter explained that adding four positions would increase efficiency such that cases could be more quickly decided. Citing the costs of immigration detention, the commenter explained that reducing the time to issue decisions would save the government money by reducing the amount of time noncitizens in removal proceedings spend in detention. Further, the commenter explained that the difficulty of reaching a consensus would not significantly change by adding four members instead of two.

Response: The Department appreciates the commenter's suggestion. As explained above, the present final rule expands the Board by five additional members, for a total of 28 members. EOIR's caseload has risen since the 2020 IFR was promulgated, and the Department believes expanding the Board to 28 members appropriately balances the need for efficient adjudications against the need to maintain cohesion and protect the Board's ability to reach consensus. The Department may, if warranted by changing circumstances, engage in future rulemaking to further alter the size of the Board.

Comment: Several commenters provided suggestions regarding the Board's case processing, management, and organization. These suggestions, and the Department's responses, are as follows:

- *Suggestion:* The Board should "hear arguments on cases to gain a deeper understanding of the government's position and importantly the immigrant's position." *Response*: The decision whether to hear an oral argument in a case is made at the discretion of a three-member panel or the en banc Board. *See* 8 CFR 1003.1(e)(7).
- *Suggestion*: The Board should move from a paper system to an electronic, online system, which the commenter suggested would improve the efficiency of adjudications and increase confidentiality of files. *Response:* The Board is

transitioning from a paper filing system to an electronic filing system. *See* EOIR Electronic Case Access and Filing, 86 FR 70708 (Dec. 13, 2021).

- *Suggestion*: The Board should raise filing fees in order to hire more temporary Board members, if necessary, and staff. *Response*: EOIR is not a fee-funded agency, and monies collected in filing fees are not applied to EOIR staffing. Therefore, raising the Board's filing fees would not increase the Board's ability to hire temporary Board members and other personnel.
- *Suggestion*: The Department should "consider auditing and revitalizing the streamlining reforms to better scale its caseload management up (or down) in response to the surge crises that are intrinsic to modern migration flows." *Response*: As noted above, the Board's current caseload is significantly larger than when the regulatory "streamlining" procedural provisions were promulgated in 2002.[11] Though those provisions remain in the regulations, the Department believes that an effective way to manage the current increase in caseload is to increase the size of the Board.
- *Suggestion*: The Department should use temporary Board members to a greater extent at the initial screening review to "divert[] more appeals to single member review for affirmance without opinion." *Response*: Temporary Board members can be, and are, assigned to the Board's screening panel. Decisions whether particular cases meet the requirements for affirmances without opinion are made by Board members, including temporary Board members, on a case-by-case basis. *See* 8 CFR 1003.1(e)(4).
- *Suggestion*: The Board should improve its management of certain types of cases at the initial screening review, including appeals of asylum decisions based on mixed claims of law and fact regarding country conditions and appeals of denials of

[11] *Compare* 67 FR 54878 (57,597 pending appeals on September 30, 2001), *with* EOIR Adjudication Statistics: All Appeals Filed, Completed, and Pending (Oct. 12, 2023), https://www.justice.gov/media/1174881/dl?inline (over 72,000 pending appeals at the end of fiscal year 2019, and over 113,000 pending appeals at the end of fiscal year 2023).

discretionary waivers of removability. *Response*: As noted elsewhere, the Board's caseload has grown significantly in recent years. While the Board sometimes modifies its procedures for screening cases, the Department believes that no such procedural changes would be sufficient to address the Board's current increased caseload, and that increasing the size of the Board is necessary at this time.

- *Suggestion*: The Board should increase the rate of summary dismissals on frivolity grounds. *Response*: Summary dismissals of appeals are governed by 8 CFR 1003.1(d)(2), and a case must meet certain requirements in order for a summary dismissal to be appropriate. Determinations whether to summarily dismiss cases are made by Board members on a case-by-case basis.
- *Suggestion*: The Department should hire more immigration judges and add more immigration courts across the country rather than focus its efforts on the Board. *Response*: As noted above, EOIR has already expanded the immigration judge corps significantly in recent years.[12]
- *Suggestion*: The Department should change policies pertaining to the beginning phases of the immigration adjudication process, not to the final step, so that there are fewer immigration cases to begin with. *Response*: Decisions whether to place foreign-born individuals in immigration court proceedings are made by DHS, and not by the Department, and therefore are outside the scope of this rulemaking.

4. Miscellaneous Concerns

Comment: One commenter raised concerns about the number of Board members on each panel if the Board has a total of 23 members. The commenter explained that, with 23 members, the Board would consist of seven panels of three members and one panel of two members; the commenter was concerned that splits would inevitably result from the two-member panel. The

[12] *See* EOIR Adjudication Statistics: Immigration Judge (IJ) Hiring (Oct. 2023), https://www.justice.gov/media/1174816/dl?inline.

commenter stated that 8 CFR 1003.1, establishing the current system of seven panels of three members, controlled and allowed the Board to properly function.

Response: The commenter misinterprets 8 CFR 1003.1(a)(3), which governs the division of the Board into panels. This provision principally gives the Chairman the authority to "divide the Board into three-member panels" and to "assign any number of Board members" to the Board's "screening panel," which, under the Board's case management system, is responsible for the initial evaluation of cases. 8 CFR 1003.1(a)(3), (e). The three-member panels referenced in 8 CFR 1003.1(a)(3) are composed of different combinations of Board members. In other words, the same three Board members need not be permanently assigned only to one panel. Regardless of the size of the Board, neither 8 CFR 1003.1(a)(3) nor any other regulatory provision permits cases to be decided by two-member panels, and this rulemaking has not resulted, and will not result, in any such adjudications.

Comment: One commenter alleged that the Department did not address whether it "believe[d] that this consistent increase of cases will cease after the number of [Board] members is increased." The commenter remarked that it seemed likely that the Department would have to add more Board members in the future.

Response: There are many variables that affect the Board's caseload, and the Department cannot project the Board's future caseload with certainty. This final rule increases the Board's size from 23 to 28 members. Going forward, the Department may, if warranted, alter the size of the Board via additional rulemakings.

Comment: One commenter suggested that further data would be helpful to know whether a larger number of Board members would, in fact, make it more difficult to reach consensus when issuing precedent decisions. The commenter provided the following examples that would be helpful for such an inquiry: the number of decisions that fail to receive a necessary majority of votes to become precedent and the percentage of approval by which recent precedent decisions have passed.

Response: The Department appreciates the comment regarding acquiring data to determine whether increasing the Board's size affects its ability to reach consensus; the Department may consider this suggestion for future rulemakings. At this time, however, no such data is available.

Comment: Another commenter criticized the immigration system as a whole, stating that it constitutes a "web of bureaucracy" developed over the past century.

Response: The commenter's concern with the immigration system as a whole is outside the scope of this rulemaking. As a result, the Department declines to respond.

IV. Regulatory Requirements

A. Administrative Procedure Act

Notice and comment is unnecessary because this is a rule of management or personnel as well as a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(a)(2), (b)(A). For the same reasons, this rule is not subject to a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (d).

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act ("RFA"), "[w]henever an agency is required by section 553 of [the Administrative Procedure Act], or any other law, to publish general notice of proposed rulemaking for any proposed rule, . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis." 5 U.S.C. 603(a); *see also* 5 U.S.C. 604(a). Such analysis is not required when a rule is exempt from notice-and-comment rulemaking under 5 U.S.C. 553(b) or other law. Because this is a rule of internal agency organization and therefore is exempt from notice-and-comment rulemaking, no RFA analysis under 5 U.S.C. 603 or 604 is required.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not

significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review)

This rule is limited to agency organization, management, or personnel matters and is therefore not subject to review by the Office of Management and Budget pursuant to section 3(d)(3) of Executive Order 12866, Regulatory Planning and Review. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), Executive Order 13563, and Executive Order 14094. Executive Orders 12866, 13563, and 14094 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The benefits of this rule include providing the Department with an appropriate means of responding to the increased number of appeals to the Board. The public will benefit from the expansion of the number of Board members because such expansion will help EOIR adjudicate cases in a fair, efficient, and timely manner. Overall, the benefits provided by the Board's expansion outweigh the costs of employing additional federal employees.

E. Executive Order 13132—Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule because there are no new or revised recordkeeping or reporting requirements.

H. Congressional Review Act

This is not a major rule as defined by 5 U.S.C. 804(2). This action pertains to agency organization, management, and personnel and, accordingly, is not a "rule" as that term is used in 5 U.S.C. 804(3). Therefore, the reports to Congress and the Government Accountability Office specified by 5 U.S.C. 801 are not required.

List of Subjects in 8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, part 1003 of title 8 of the Code of Federal Regulations is amended as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

2. In § 1003.1:

a. Revise the third sentence of paragraph (a)(1) and the first and second sentences of paragraph (a)(4) to read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(a)(1) * * * The Board shall consist of 28 members. * * *

* * * * *

(a)(4) * * * Upon the recommendation of the Director, the Attorney General may in his discretion appoint immigration judges, retired Board members, retired immigration judges, and administrative law judges employed within, or retired from, EOIR to serve as temporary Board members for renewable terms not to exceed six months. In addition, upon the recommendation of the Director and with the approval of the Deputy Attorney General, the Attorney General may in his discretion appoint one or more senior EOIR attorneys with at least ten years of experience in the field of immigration law to serve as temporary Board members for renewable terms not to exceed six months.

* * * * *

March 27, 2024.
Date

Merrick B. Garland,
Attorney General.

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